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In the

Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF AMICUS CURIAE FOR CHICAGO TRIBUNE COMPANY, GORE NEWSPAPERS COMPANY AND SENTINEL STAR COMPANY IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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May It Please The Court:

This amicus brief is submitted on behalf of the Chicago Tribune Company, Gore Newspapers Company and the Sentinel Star Company in support of the appellant. Consent to the filing of this brief has been obtained from both the appellant and appellee pursuant to Rule 42(1).

INTEREST OF AMICI.

Amicus Chicago Tribune Company publishes the *Chicago Tribune*, one of the nation's largest metropolitan daily and Sunday newspapers. Amici Gore Newspapers Company and the Sentinel Star Company are publishers of leading metropolitan daily and Sunday newspapers in southern and central Florida, *i.e.*, the *Fort Lauderdale News* and *Sun-Sentinel* in Fort Lauderdale and the *Orlando Sentinel-Star* in Orlando, respectively.[1]

The *Chicago Tribune* has a long and well known practice of appearing in litigation involving attempted encroachments upon freedom of the press. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1930); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *Walker*, 388 U.S. 130 (1966); *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923).

All three amici are deeply and vitally concerned over the impact and far-reaching First Amendment implications of the decision below sustaining the Florida "right of reply" statute. Gore Newspapers Company and the Orlando Sentinel Star Company as Florida newspaper publishers are directly and immediately affected by the statute; if it is permitted to stand, they will face the choice of attempting to comply with the statute under pain of both criminal and civil sanctions, or to print nothing that is critical of political candidates.

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[1] The three named *amici* are all subsidiaries of Tribune Company, a Delaware corporation having its headquarters and principal place of business in Chicago, Illinois.

The *Chicago Tribune,* although predominantly distributed in the metropolitan area of Chicago, also circulates in Florida. The Florida "right of reply" statute does not distinguish betwee in-state and out-of-state newspapers Moreover, the *Chicago Trbune* enjoys circulation in all other States of the Union; if the Florida statute is allowed to stand many other States may well adopt it, thereby expanding *ad infinitum* the possible criminal and civil exposure of the *Chicago Tribune* for claimed violations.

STATUTE INVOLVED.

The Florida "right of reply" statute (Section 104.38, Florida Statutes) provides:

> *"Newspaper assailing candidate in an election; space for reply.*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."[2]

[2] A "misdemeanor of the first degree" is punishable by a jail sentence of up to one year and a fine of up to $1,000.00. (§§775.082, 775.083, Florida Statutes.)

ARGUMENT.

Originally enacted in 1913, the Florida "right of reply" statute has lain ignored and dormant on the books for over sixty years, not unlike a creature of fiction that everyone thought dead. The fact that it has now been resurrected and revived with utmost seriousness by appellee Tornillo and the Florida Supreme Court is, we think, almost stranger than fiction itself, and certainly more terrifying to publishers and all others who value First Amendment freedoms.

The *Miami Herald's* Jurisdictional Statement amply demonstrates the conflict between the decision below and the past holdings of this Court under the First and Fourteenth Amendments.[5] We shall not duplicate that discussion, but instead shall focus upon the total contradiction between the Florida "right of reply" statute and the First Amendment when mirrored against its history. We believe that a glimpse into the past highlights the fact that the Florida statute is an instrument devised by the censor.

I.

THE FLORIDA "RIGHT OF REPLY" STATUTE IS DIAMETRICALLY OPPOSED TO THE HISTORY AND ESSENCE OF FIRST AMENDMENT FREEDOM OF THE PRESS.

The struggle for freedom of the press has always had as its storm center the issue of what the press may freely publish about the government and those who govern or

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[5] *E.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

wish to govern. Indeed, at the risk of oversimplifying, we submit that the quintessence of our First Amendment free press heritage is the right to print or not print whatever is desired about government and politics without official restraint, compulsion or reprisal.

A. Suppression Prior to the First Amendment.

History records that for centuries there was no freedom to publish anything about governmental affairs. The tyrants and dictators of Rome and Medieval Europe strictly prohibited any verbal or written "newsmongering" among the people about matters of government, under pain of immediate torture or death. See Arthur & Crosman, *Law of Newspapers*, p. 2 (2d Ed. 1940); Thayer, *Legal Control of the Press*, pp. 6-8 (3rd Ed 1956). In England, the prohibition was codified in 1274 by the enactment of *De Scandalis Magnatum*, (3 Edw. I, c. 34); this edict outlawed any and all spoken or written utterances deemed remotely critical of the Crown or any men of the realm. See I Hallam, *Constitutional History of England*, pp. 36-45 (5th Ed. 1841); II Stephen, *A History of the Criminal Law of England*, p. 350 (1883).

After the printing press first appeared in England in 1476, its dramatic potential as a means of politically informing and arousing the people was soon recognized. The enforcement of *De Scandalis Magnatum* was accordingly vested in the notorious Court of Star Chamber, and the crime of seditious libel was expanded to include "even the thoughts of men, who should by words, writing, imprinting, or any other exterior act, directly or indirectly, judge or believe contrary to the royal pleasure." Thayer, *Legal Control of the Press*, p. 9 (3rd Ed. 1956). The Star

Chamber was of royal prerogative and not bound by any rules; a "trial" in the Chamber for seditious libel was a farce and a prelude to flogging, mutilation, branding, pillorying and gargantuan fines and prison terms. Siebert, *Freedom of the Press in England, 1476-1776*, pp. 121-22 (1952); Burn, *The Star Chamber*, Preface, pp. 10-14 (London 1870).[4]

The Star Chamber was abolished in 1641, but Parliament and the Common Law Courts became even more oppressive in stifling free political discussion.[5] II Stephen, *A History of the Criminal Law of England*, pp. 300-01 (1883). "Treason" was redefined to include such things as merely imagining the death of the King or Queen (25 Edw. III, c. 2) and the smothering prior restraints of royal licensing and censorship of the press were imposed and strictly enforced; only the most innocuous or flattering words about the monarchy could legally appear in print. See Plucknett, *Taswell-Langmead's English Constitutional History*, pp. 661-63 (11th Ed. 1960).

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[4] A typical and oft-cited example of a Star Chamber prosecution for seditious libel is the *Trial of Wm. Prynn*, 3 Howell's State Trials 561 (1632). The defendant had written a book criticizing public plays, dances, festivals and other amusements; the book contained one sentence to the effect that loose women frequently took part in plays. Because the Queen had recently taken part in a pastoral play, Prynn was "tried" and convicted for seditious libel; he was sentenced to life imprisonment, fined ten thousand pounds, and in addition, was branded on the forehead, his nose was slit and his ears were cut off. His book was publicly burned.

[5] Unlike the Star Chamber, the Common Law Courts were empowered to impose the death penalty and in cases of seditious libel or treason, death was frequently inflicted by drawing and quartering or beheading. See *Rex* v. *Twyn*, 6 Howell's State Trials 514 (1664). See also Thayer, *Legal Control of the Press*, pp. 10-11 (3rd Ed. 1956).

The English, as could be expected, imported into colonial America their oppressive techniques of stifling all political debate and criticism. The first newspaper to be printed in the colonies, *Publick Occurrences Both Forreign and Domestick* (Boston, September 25, 1690), was suppressed and outlawed after its maiden edition had appeared. See Lee, *The Daily Newspaper in America*, p. 15 (1937). Moreover, the well-known prosecutions of Peter Zenger, Thomas Maule and Roger Williams were all predicated on the English law of seditious libel. See Levy, *Legacy of Suppression*, pp. 32-34 (1960); Thayer, *Legal Control of the Press*, pp. 18-22 (3rd Ed. 1956). There was in the main no right to print anything critical or controversial about the Crown or the colonial regimes.

After the break with England and the ratification of the Constitution, the First Amendment was adopted in an effort to guarantee freedom of speech and press once and for all. However, and most regrettably, the First Amendment did not signal the end of suppression and attempted suppression of free political debate and criticism in the United States.

B. Suppression After the First Amendment.

Within a scant seven years after the adoption of the First Amendment, Congress incredibly passed the Sedition Act of 1798, directly incorporating into our law the English concept of seditious libel. See Hudon, *Freedom of Speech and Press in America*, pp. 44-52 (1963). Enforcement was brief and half-hearted in apparent recognition of the Act's direct clash with the First Amendment, and the crime of seditious libel was finally disavowed and

abandoned in this country.(*) See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273-76 (1964): Chafee, *Free Speech in the United States*, pp. 506-07 (1941).

However, those who wished to suppress and censor the press began a search for new and more subtle techniques to achieve their goal—a search that has continued to this day. The device most often attempted has been the civil libel suit, with its lack of criminal law safeguards and unlimited general and punitive damages. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923); *Sweeney* v. *Patterson*, 128 F.2d 457, *cert. denied*, 317 U.S. 678 (1942).

Other forms of attempted suppression have included criminal libel prosecutions (*Garrison* v. *Louisiana*, 379 U.S. 64 (1964)), civil injunctions (*Near* v. *Minnesota*, 283 U.S. 697 (1930)), taxation of revenue based on circulation (*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936)), indirect contempt of court, (*Pennekamp* v. *Florida*, 328 U.S. 331 (1946)), and forcing the publication of advertising that is offensive to a newspaper's advertising standards or policy (*Chicago Joint Board, Amal. Clothing*

(*) President Jefferson pardoned all persons who had been convicted and sentenced under the Sedition Act, stating "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. (Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 276 (1964).

Workers v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971)).

C. The Suppression Involved in the Instant Case.

From the days of the Star Chamber to the present, those who have sought to restrain or censor political news and criticism have invariably professed some lofty or pious motive for doing so. As Justice Stewart observed last Term, "There is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 at 144 (1973) (concurring opinion). This Court, however, has been acutely sensitive to all efforts to suppress or censor the press and has not been deceived by noble motives or clever disguises. Whether the restraint be cloaked under an alleged need to protect reputation (as in *Sullivan, supra*) or to preserve the judicial process (as in *Pennekemp, supra*), the Court has recognized the inherent suppression involved and condemned it.

The Florida "right of reply" statute presents still another disguised and insidious attempt at suppression and restraint of the press. In keeping with past censorial traditions, the statute bears a virtuous title and is defended with a pious declaration of worthy motives and purpose; the Florida Supreme Court has stated that the statute will promote "fair elections" and will actually "encourage rather than impede the wide open and robust dissemination of ideas and counterthought." The argument is sheer sophistry. We submit that no one who has been exposed to American newspaper coverage of a heated election campaign could seriously make such a statement.

In most if not all political campaigns, it would be practically impossible to publish any reports or comments concerning the merits of competing candidates without running directly into the teeth of the "right of reply" statute. Simply reporting as news a statement or speech of one candidate "assailing" or "attacking" (*i.e.*, criticizing) his opponent, would activate the statute and require giving the speaker's opponent free and equal space in the newspaper for "reply." If the reply makes a counterattack that in turn requires a reply, the resulting round-robin could prove endless. Moreover, the statute's application to the editorial page could result in the "right of reply" cycle being triggered by an editorial comment, or even by merely endorsing one candidate over another, as many newspapers do in every election; an endorsement in itself is a weighty and implicit attack against the candidate not endorsed. See *Mills* v. *Alabama*, 384 U.S. 214, 218-20 (1966).

In sum, little imagination is required to see that if newspapers continued their customary news and editorial coverage of election campaigns (particularly in presidential election years when scores of national, state and local candidates are on the ballot), newspapers would be compelled to add endless columns to accommodate the Florida "right of reply" statute, or in the alternative print nothing about political campaigns. Any responsible editor or publisher—faced with the Hobson's choice of seeing much of his newspaper dictated by politicians and government officials or of incurring the criminal penalties of the "right of reply" statute (up to one year in jail and a fine of $1,000)—would clearly opt in favor of printing little or nothing about political campaigns.

It may be argued that the statute's impact would not be as drastic as we envision, *i.e.*, that political campaigns would still be covered. But regardless of how severe the statute may prove in practice, we think it beyond argument that some inhibition must result. The amount or degree would depend on the particular campaign being covered, the policy of individual newspapers, and a myriad of other factors. But the extent of the suppression need not be debated. This Court has declared that our national commitment under the First Amendment is to encourage, not inhibit, comment and criticism, especially in the political arena. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 270 (1964). Thus, once the statute is viewed, as we believe it must be, as an inhibitor of robust debate to any degree, it must be stricken for violation of the First Amendment.

CONCLUSION.

We respectfully submit that the Court should note jurisdiction of this appeal, and summarily reverse the judgment of the Florida Supreme Court forthwith.

Repectfully submitted,

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